APPEAL NO. 032531
FILED NOVEMBER 14, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was initially held on June 27, 2002. The transcript from that proceeding indicates that the hearing officer intended to leave the record open for 15 days and then issue a decision and order. This did not occur and, instead, the hearing officer sent the case back to a benefit review conference for further clarification of the issues. For reasons that are unclear, the hearing did not reconvene until August 21, 2003. With regard to the disputed issues, the hearing officer determined that the respondent (claimant) reached maximum medical improvement (MMI) on October 10, 2001, with a 23% impairment rating (IR), and that the claimant had disability from August 26, 2000, to October 10, 2001. The appellant (carrier) urges that the hearing officer's MMI/IR determinations are incorrect because the great weight of the medical evidence is not contrary to the designated doctor's opinion that the claimant reached MMI on August 25, 2000, with an 11% IR. Additionally, the carrier urges that the claimant did not have disability for the time period in question. The claimant urges affirmance of the hearing officer's decision.

DECISION

Affirmed in part, reversed and rendered in part.

MMI AND IR

The evidence reflects that the claimant sustained a compensable injury, in the form of bilateral carpal tunnel syndrome, in _____. She underwent five surgeries between December 1999 and May 2002. The Texas Workers' Compensation Commission (Commission) appointed Dr. M to serve as designated doctor. He initially examined the claimant on September 13, 2000, at which time he determined that the claimant had reached MMI on August 25, 2000, with an 11% IR comprised of loss of range of motion (ROM) in both wrists. Sometime prior to January 9, 2002, the Commission sent a letter of clarification to Dr. M inquiring as to whether it would be appropriate to change the claimant's MMI date. Based on the request, Dr. M reexamined the claimant on January 9, 2002, and indicated in a letter dated January 15, 2002, that his original MMI date would be accurate because in September 2000, the claimant's "level of medical improvement had reached a plateau and had remained at this level for six months, which is verified by the report of Dr. D on July 29, 2000." Dr. M also repeated ROM testing and again found the IR to be 11%.

On February 20, 2002, the patient was examined by her treating doctor, Dr. P, who opined that the claimant's MMI date was October 10, 2001, the statutory date, and that her IR was 23% comprised of loss of ROM and nerve disorders in both extremities. Following the initial hearing date in this case, the Commission sent another letter of

clarification to Dr. M, which he responded to on September 9, 2002. In his five-page letter, Dr. M thoroughly explains his rational for determining that the MMI date was August 25, 2000, and that the correct IR at that time is 11%. Dr. M cites Section 401.011(30), which provides that MMI is "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer be anticipated." In summary, Dr. M noted that a review of the claimant's medical records indicated that she had no improvement between the MMI dates determined by him and Dr. P (August 25, 2000, and October 10, 2001); that the claimant's condition had remained constant for over one year prior to August 25, 2000; that symptom magnification may be present; and that the additional surgeries that occurred after August 25, 2002, do not necessarily equate to an improvement in condition, especially since the claimant's ROM studies indicate that "she is not making progress but is undergoing a degenerative process." The hearing officer noted in the Statement of the Evidence that Dr. M had "held fast" to his MMI/IR determination "despite other medical evidence from the Claimant's treating doctors and surgeon that she has had some improvement in her condition since August 25, 2000." The hearing officer then concluded that the great weight of the other medical evidence was contrary to Dr. M's reports; that Dr. M's reports are not entitled to presumptive weight; and that the claimant reached MMI statutorily on October 10, 2001, with a 23% IR in accordance with Dr. P's report.

Sections 408.122(c) and 408.125(e) provide that for a claim for workers' compensation benefits based on a compensable injury that occurs before June 17, 2001, the report of the Commission-selected designated doctor is entitled to presumptive weight unless it is contrary to the great weight of the other medical evidence. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to a request for clarification is also considered to have presumptive weight, as it is part of the designated doctor's opinion. *See also*, Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002. We have previously discussed the meaning of "the great weight of the other medical evidence" in numerous cases. We have held that it is not just equally balancing the evidence or a preponderance of the evidence that can overcome the presumptive weight given to the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 26, 1992. We have also held that no other doctor's report, including the report of the treating doctor, is afforded the special, presumptive status given to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992; Texas Workers' Compensation Commission Appeal No. 93825, decided October 15, 1993. The Appeals Panel has also held that whenever a hearing officer rejects a designated doctor's report, the hearing officer should "clearly detail the evidence relevant to his or her consideration." Texas Workers' Compensation Commission Appeal No. 030091-s, decided March 5, 2003.

As previously noted, the hearing officer based her decision on the fact that the claimant had "some improvement" in her condition since August 25, 2000," and had "genuine severe symptoms between August 26, 2000 and October 10, 2001." The

claimant testified, however, that she had no improvement in her condition until after her last surgery, which occurred in May 2002, well after the statutory MMI date. Additionally, the fact that the claimant may have had "some improvement" and "genuine severe symptoms" after August 25, 2000, does not necessarily result in the conclusion that further material recovery from or lasting improvement to an injury could be anticipated, thereby resulting in a different MMI date. For these reasons, the hearing officer erred in not affording presumptive weight to the designated doctor's report and clarifications. Accordingly, the hearing officer's determinations that the claimant reached MMI on October 10, 2001, with a 23% IR are reversed and a new decision rendered that Dr. M's report is entitled to presumptive weight and that, in accordance with his report, the claimant reached MMI on August 23, 2000, with an 11% IR.

DISABILITY

Whether the claimant had disability from August 26, 2000, through October 10, 2001, was a factual question for the hearing officer to resolve. A disability determination can be established by the claimant's testimony alone, if believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). Disability and MMI are two entirely different concepts and one can have disability after reaching MMI, although temporary income benefits would not be payable. *See* Section 408.101. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). It was the hearing officer's prerogative to believe all, part, or none of the testimony of any witness, including that of the claimant. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). Nothing in our review of the record indicates that the hearing officer's disability determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's disability determination is affirmed. The MMI and IR determinations are reversed and a new decision rendered that the claimant reached MMI on August 25, 2000, with an 11% IR.

The true corporate name of the insurance carrier is **TEXAS PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION for Reliance Insurance Company, an impaired carrier** and the name and address of its registered agent for service of process is

MARVIN KELLY, EXECUTIVE DIRECTOR
9120 BURNET ROAD
AUSTIN, TEXAS 78758.

_____
Chris Cowan
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Margaret L. Turner
Appeals Judge